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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ...75-1860

ELIJAH EPHRAIM JHIRAD,

Petitioner,

v.

THOMAS E. FERRANDINA, United States Marshal
Southern District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI

EDWARD L. SADOWSKY
Attorney for Petitioner
100 Park Ave.
New York, New York
(212) 953-1800

TENZER, GREENBLATT, FALLON & KAPLAN
of Counsel

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THOMAS E. FERRANDINA, United States Marshal
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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Elijah Ephraim Jhirad respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this international extradition case on April 12, 1976.

Opinions Below

1. District Court Memorandum and Order Denying Jhirad's First Petition for Writ of Habeas Corpus. 355 F. Supp. 1155 (S.D.N.Y. 1973).

2. Magistrate's Opinion and Decision Following § 3184 Extradition Hearing. Not officially reported. Docket No. 72 MCA 1214 April 12, 1973.

3. District Court Opinion and Order Denying Jhirad's Second Petition for Writ of Habeas Corpus.
362 F. Supp. 1057 (S.D.N.Y. 1973).

4. Second Circuit Court of Appeals Opinion and Order Reversing Prior District Court Orders and Remanding Case for Further Findings.
486 F. 2d 442 (2d Cir. 1973).

5. District Court Opinion and Order Denying Jhirad's Application for Order Barring Further Hearing before Magistrate and for Pre-Hearing Discovery.
377 F. Supp. 34 (S.D.N.Y. 1974).

6. Magistrate's Additional Findings on Hearing Following Remand.
Not Officially Reported.
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7. District Court Opinion and Order Denying Jhirad's Third Petition for Writ of Habeas Corpus.
401 F. Supp. 1215 (S.D.N.Y. 1975).

8. Second Circuit Court of Appeals Opinion and Judgment Affirming District Court Orders Following Remand.
—— F. 2d —— (2d Cir. 1976).
Docket No. 75-2102 April 12, 1976.

9. Second Circuit Memorandum and Order Denying Jhirad's Petition for Rehearing.
—— F. 2d —— (2d Cir. 1976).
Docket No. 75-2102 May 21, 1976.

The foregoing opinions, memoranda and findings, being voluminous, are reprinted in a separately bound appendix submitted simultaneously herewith.

Jurisdiction

The judgment of the Second Circuit Court of Appeals was made, entered and filed on April 12, 1976. A timely petition for rehearing was denied on May 21, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). The jurisdiction of the courts below was invoked under 28 U.S.C. § 2241.

Questions Presented

1. Did the United States Magistrate have subject matter jurisdiction to hear and decide an evidentiary issue respecting the statute of limitations in petitioner's habeas corpus proceeding, despite this Court's decision in *Wingo* v. *Wedding*.

2. Does 18 U.S.C. § 3290 toll the running of the statute of limitations whenever the accused is absent from the jurisdiction; or is proof of flight with the intention to avoid prosecution required. (There is a split in the circuits on this issue.)

3. Did the lower courts' application of the concededly novel doctrine of "constructive flight" to 18 U.S.C. § 3290 —without any prior notice and only after the close of the trial of the limitations issue—deprive petitioner of his constitutional right to due process of law.

4. Did the extradition treaty and the constitutional right to equal protection of the laws require the application of the beyond a reasonable doubt standard of proof to the trial of the limitations issue; or was proof by a mere preponderance of the evidence sufficient.

5. Was there any evidence in the record to sustain the Magistrate's finding that petitioner determined not to re-

turn to India because of fear of prosecution in mid-September 1966.

6. Did the absence of any evidence either that a portion of the Naval Prize Fund was missing or that an eligible recipient had failed to receive his share require the Magistrate to find no probable cause for extradition.

7. Did petitioner demonstrate that the Indian request for his extradition was, in fact, politically motivated and therefore barred by the extradition treaty itself.

Treaty Provisions

India relies upon the British/American Extradition Treaty of 1931 (acceded to by Great Britain on behalf of its then Colony of India in 1942) and upon an exchange of diplomatic notes in 1967 between the United States Department of State and the Indian Embassy in Washington, D.C. confirming the continuing validity of that treaty between the United States and the Republic of India. Its provisions being voluminous, the treaty is reproduced in the separately bound appendix submitted simultaneously herewith.

Statute of Limitations and Tolling Provision

18 U.S.C. § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3290. Fugitives from justice

No statute of limitations shall extend to any person fleeing from justice.

Extradition Statutes

18 U.S.C. § 3181. Scope and limitation of chapter

The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

18 U.S.C. § 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Habeas Corpus Statutes

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2243. Issuance of writ; return; hearing decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. • • •

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Statement of the Case

Petitioner Elijah Ephraim Jhirad—former Judge Advocate General of the Indian Navy—opposes extradition proceedings, instituted by the Government of India, on a charge of misappropriating from a Naval Prize Fund the rupee equivalent of $1,600 in September, 1961.

Jhirad—an Indian Jew by birth—rose to the highest civilian post in the Indian Navy in 1947 following distinguished war time service and admission to the bar at Great Britain's Lincoln's Inn. Following his semi-retirement in 1964—three years after the Prize Fund in question had been completely distributed—Jhirad continued his active international law practice. In July 1966, he left

India with his family to attend a World Jewish Congress in Brussels, to be followed by a business/vacation stay in Europe. At the invitation of the Israeli Government, he and his family emigrated to Israel in 1967, becoming a citizen and Special Adviser to that government on Maritime Affairs. (Jhirad is an internationally recognized scholar on the law of the sea.) In 1971, the Jhirad family emigrated to the United States, where he is a Managing Editor for Warren Gorham & Lamont. Jhirad is presently applying for United States citizenship, having been a permanent resident for five years.

India first filed its charges against Jhirad, in absentia, in 1968. India filed its complaint in extradition in the District Court for the Southern District of New York, in August 1972, pursuant to the British/American Extradition Treaty of 1931 (Appendix A and B). In April 1973, the United States Magistrate, following a hearing pursuant to 18 U.S.C. § 3184, found probable cause to hold Jhirad for extradition on four of the original fifty-two charges (Appendix D)—the remaining counts being barred by the Treaty's application (Article 5, Appendix A, at page 6a) of the American statute of limitations (18 U.S.C. § 3282).*

Jhirad tested both the Magistrate's jurisdiction and the validity of his determination by means of petitions for a writ of habeas corpus, brought before and after the § 3184 hearing, in the District Court pursuant to 28 U.S.C. § 2241. He took a consolidated appeal to the Second Circuit from the denial of both writs (Appendix C and E).

The Court of Appeals (Jhirad I) reversed and remanded to the District Court for further findings on Jhirad's intent in leaving India in July 1966 (Appendix F)—holding (a)

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* Later decisions by the District Court and the Court of Appeals barred two more of the charges on the same ground. Appendix J, at page 92a.

that the statute of limitations had run unless the tolling provision (18 U.S.C. § 3290) applied and (b) that that turned on whether Jhirad had left India for the purpose of avoiding prosecution.* Over Jhirad's objection, the District Court directed the Magistrate to hear and determine this issue (Appendix G).

Following an evidentiary hearing in January 1974, the Magistrate found (Appendix H) that Jhirad left India without intention to flee from prosecution; but the Magistrate then invented a doctrine of so-called "constructive flight", found that Jhirad had decided not to return to India in "mid-September 1966", and concluded that the running of the limitations period had been thereby tolled just days before it would otherwise have expired—on September 25 and 27, 1961—with respect to the last two charges outstanding.

Jhirad's third petition for a writ of habeas corpus to the District Court—again pursuant to 28 U.S.C. § 2241—having been denied (Appendix I), he appealed again to the Second Circuit. In an utterly inexplicable reversal of its earlier construction of § 3290, the panel in Jhirad II held Jhirad's innocent motivation in departing from India was irrelevant and that his mere absence—coupled with his alleged decision not to return for fear of prosecution—was sufficient to trigger the tolling provision. (Appendix J).

Jhirad's application for rehearing—on the ground (a) that the hearing and determination by the Magistrate of an evidentiary issue in the habeas corpus proceeding violated the jurisdictional requirements of 28 U.S.C. § 2243 and (b) that the invention of the doctrine of "constructive flight" only *after* that hearing violated due process require-

* The Jhirad I panel noted that there was a substantial conflict in the circuits on whether § 3290 was triggered by mere absence from the jurisdiction or whether proof of intent to avoid prosecution was required. As a result of the decision in Jhirad II, that conflict still remains.

ments—was similarly denied (Appendix L). This petition followed.

The net result of all of the foregoing is that Jhirad faces extradition to India to stand trial on a charge of misappropriating $1,600 *fifteen years ago.** India nonetheless persists in pursuing this stale and trivial charge. Nor does it deny that it subjected Jhirad, while in India, to enormous harassment because of his outspoken defense of Zionist and Israeli causes at a time when India was a staunch member of the Arab bloc. Jhirad has therefore argued from the outset—and urges again in this Court—that the true motivation of the Government of India in seeking his extradition still is, in fact, political retribution—in plain violation of Article 6 of the Treaty upon which it relies (Appendix A, at page 6a).

REASONS FOR GRANTING THE WRIT

I.

The Magistrate who heard and decided the limitations issue in the habeas corpus proceeding had no subject matter jurisdiction and acted in direct violation of this Court's decision in *Wingo* v. *Wedding*.

Article 5 of the Treaty (Appendix A, page 6a) provides that the American statute of limitations is a bar to extradition. The Magistrate nonetheless held Jhirad for extradition to India; and the latter sought to test the legality of that detention by petition for the writ of habeas corpus. *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Sayne* v. *Shipley*, 418 F. 2d 679, 685-686 (5th Cir. 1969). The Dis-

* India concedes, as it must, that it can only try Jhirad on precisely those charges on which he is extradited in accordance with Article 7 of the Treaty. Appendix A, at page 7a.

trict Court denied Jhirad's petition for the writ. The Court of Appeals reversed and remanded the case for further findings of fact respecting the limitations issues raised by Jhirad in his petition. On the remand, over the objection of Jhirad, the District Court directed the Magistrate to hold the evidentiary hearing called for by the Court of Appeals. (Appendix G, page 70a; 377 F.Supp., at page 37.)

The Magistrate had no subject matter jurisdiction over, and no authority to conduct, an evidentiary hearing in a habeas corpus proceeding under 28 U.S.C. § 2243. *Wingo* v. *Wedding*, 418 U.S. 461 (1974).

In *Wingo*, this Court held that Section 2243 requires evidentiary hearings in habeas corpus proceedings to be held personally before a federal judge, despite the attempt (in that case) of a district court to grant that authority to a United States magistrate pursuant to the court's rule-making power under 28 U.S.C. § 636(b)(3). This court phrased the issue before it in *Wingo* as follows:

> "The question here is whether Federal Magistrates are authorized to conduct evidentiary hearings in federal habeas corpus cases."

The Second Circuit Court of Appeals, below, responded by suggesting (a) that *Wingo* "arose in the wholly different context of a domestic criminal prosecution" and (b) "revolved around an interpretation of an entirely different statute . . . 28 U.S.C. § 636(b)".

Wingo, however, arose in precisely the same context as the case at bar—that is, in a federal habeas corpus proceeding. That the one proceeding was brought to test the legality of the detention of the petitioner following state court criminal proceedings and the other was brought to test the legality of the detention of the petitioner following extradition proceedings is a distinction without a difference. In each case the sole issue was what judicial officer

was authorized by law to conduct an evidentiary hearing within the federal habeas corpus proceeding itself. This Court, in *Wingo*, made no exceptions to its flat and unequivocal command that 28 U.S.C. § 2243 "requires that the District Judge personally hold evidentiary hearings in federal habeas corpus cases. . . ."

Moreover, *Wingo* did not "revolve" around an "interpretation" of § 636(b). This Court simply concluded that that statute—pursuant to which the district court in *Wingo* had sought to proceed—could not and did not override the requirement of § 2243 that the district judge personally hold the evidentiary hearing. In the instant case, the district judge did not even purport to act pursuant to authority in assigning the magistrate the task of holding the evidentiary hearing. The instant case is, therefore, an even more egregious breach of the *Wingo* doctrine than was *Wingo* itself.

The Court of Appeals suggested that "Jhirad would thus impose a bifurcated structure on international extradition proceedings. . . ." It is not Jhirad that imposes the bifurcated structure but rather the Extradition Treaty, which incorporates the domestic statute, together with the clear dictate of this Court in *Wingo*.

The Court of Appeals was incorrect in suggesting that Jhirad had failed to object to the Magistrate holding the evidentiary hearing in the habeas corpus proceeding, and that such objections were non-jurisdictional. Jhirad did object (Appendix H, at page 74a); but more importantly, the objection plainly goes to the subject matter jurisdiction of the Magistrate; and such objections may be raised at any time. Moore's Federal Practice, §§ 0.60[4], 12.23; *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884); *Louisville & Nashville Ry.* v. *Mottley*, 211 U.S. 149 (1908); *McNutt* v. *G.M.A.C.*, 298 U.S. 178, 189 (1936); *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951); cf. F.R. Civ. P. 12 (h)(3).

II.

There is a conflict in the circuits and within the Second Circuit itself respecting the construction of 18 U.S.C. § 3290 which requires resolution by this Court.

Jhirad is still being held for extradition to India—on the last two of the original 52 charges brought against him—because of the construction and application by the lower courts of the tolling provision (18 U.S.C. § 3290) to the running of the five-year limitations period (incorporated by reference into the Extradition Treaty). There is a substantial conflict respecting the proper construction of that statute not only between the various circuit courts but between the two panels of the Second Circuit which considered Jhirad's appeals (Jhirad I and Jhirad II) from the District Court's denial of his petition for a writ of habeas corpus.

Section 3290 of Title 18 provides that:

> "No statute of limitations shall extend to any person fleeing from justice."

The disagreement between the circuits and between the two panels of the Second Circuit revolves around the meaning of the word "fleeing". The issue is whether mere absence—or staying away—from the jurisdiction is sufficient to activate the tolling provision and, thus, stop the running of the limitations period or whether, on the other hand, the prosecution is required to present sufficient proof that the accused left the jurisdiction with the intent of avoiding prosecution.

In the federal system, the following courts have held that proof of intent to avoid prosecution at the time of the accused's departure from the jurisdiction is required before the tolling provision is triggered. *Streep* v. *U.S.*,

160 U.S. 128 (1895); *Brouse* v. *U.S.*, 68 F. 2d 294 (1st Cir. 1933); *Forthoffer* v. *Swope*, 103 F. 2d 707 (9th Cir. 1939); *Donnell* v. *U.S.*, 229 F. 2d 560 (5th Cir. 1956); cf. *Ferebee* v. *U.S.*, 295 Fed. 850 (4th Cir. 1924).

Similarly, the state courts appear invariably to construe the phrase "fleeing from justice" as requiring proof of intent to avoid prosecution. *State* v. *Washburn*, 48 Mo. 240; *U.S.* v. *Smith*, Conn. 4 Day 121, 27 Fed. Cas. 1158; *Colling* v. *State*, 217 N.W. 87, 116 Neb. 308; *State* v. *Miller*, 87 S.W. 484, 188 Mo. 370; *State* v. *Lem Woon*, 107 P. 974, 57 Or. 482; *Renner* v. *Renner*, 181 A. 191, 13 N.J. Mis. 749; *State* v. *McKenzie*, 174 A. 2d 318; *State* v. *Fowler*, 194 A. 2d 558; *Taylor* v. *State*, 292 N.W. 233, 138 Neb. 156; *State* v. *Estrada*, 114 A. 2d 323, 35 N.J. Super. 459; *State* v. *Williams*, Del. Gen. Sess. 69 A. 2d 299, 6 Terry 61; *Emery* v. *State*, 295 N.W. 417, 138 Neb. 776.

The following cases have been cited by the courts below as holding that § 3290 requires no showing of the accused's intent in leaving the jurisdiction but only proof of his mere physical departure. *Matter of Bruce*, 132 Fed. 390 (Cir. Ct. Md. 1904), aff'd sub nom. *Bruce* v. *Bryan*, 136 Fed. 1022 (4th Cir. 1905); *King* v. *U.S.*, 144 F. 2d 729 (8th Cir. 1944), cert. den. 324 U.S. 854 (1945); *Green* v. *U.S.* 188 F. 2d 48 (D.C. Cir. 1951), cert. den. 341 U.S. 955 (1951).

The Second Circuit panel in Jhirad I, relying upon *Streep, supra*, held squarely that proof of the accused's intention to avoid prosecution in leaving the jurisdiction was required before the tolling provision was triggered. The Jhirad I panel explained that:

> "It does not appear to us to be unreasonable to provide for tolling of the statute of limitations when a person leaves the place of his alleged offense to avoid prosecution or arrest and for not tolling the statute

when a person without such purpose of escaping punishment merely moves openly to another place of residence."

On the remand, the Magistrate expressly found that Jhirad left India in July 1966 "for the primary and immediate purpose of attending a World Jewish Conference in Brussels" and that "he did not leave India for the immediate purpose of avoiding prosecution. . . ." The Magistrate then went on to find that Jhirad had determined not to return to India in mid-September, just days before the five-year limitations period was due to expire on the last two charges presently outstanding against him. The Magistrate concluded that this determination by Jhirad not to return was the equivalent of a "constructive flight" sufficient to trigger the application of the tolling provision.

The findings and the conclusion of the Magistrate were affirmed by both the District Court and by the Court of Appeals.

It is plain that—despite lip service to the decision in Jhirad —the panel in Jhirad II has in fact come down on the side of the line of cases holding that mere absence from the jurisdiction—without proof that the accused left for the purpose of avoiding prosecution—is enough to trigger the application of the tolling provision.

The Jhirad II panel affirmed, but then ignored, the Magistrate's specific finding that Jhirad left India in July, 1966 without intention to flee; the panel said that "the sole issue being contested was Jhirad's intent in absenting himself from India in August and September 1966". But no evidence had ever been submitted by either Jhirad or the Government of India on that issue. Neither the Magistrate, the District Court or the Second Circuit panel in Jhirad II was able to point to any event that occurred, or circumstance that arose, *after* Jhirad left India which

would support a finding that he determined not to return in September 1966 for fear of prosecution. Without exception, every fact or circumstance relied upon by the lower courts occurred or arose prior to Jhirad's departure from India in July 1966; and the Magistrate, as affirmed on appeal, has found those facts and circumstances insufficient to support a finding of flight to avoid prosecution.

Since the District Court and the Court of Appeals left undisturbed the Magistrate's finding that Jhirad's departure was for innocent motives, the facts and circumstances in the record which occurred or arose prior to that departure could not possibly be the basis for a finding that Jhirad decided—a full two months later—not to return to India for fear of prosecution. This is particularly so because Jhirad was under no duty to return; nor had India requested his return. In short, what the Jhirad II panel plainly did was hold that Jhirad's mere leaving the jurisdiction—when coupled with his failure to return—was sufficient to trigger the application of the tolling provision.

Indeed, the whole notion of "constructive flight" applied in Jhirad II is antithetical to the construction of the statute in *Streep, Brouse, Forthoffer, Donnell* and *Jhirad I,* for, under those cases, the inquiry—and the extradition proceeding itself—would have come to a halt the moment the court found Jhirad's departure free of motivation to avoid prosecution. But the panel in Jhirad II looked beyond; and what they found, and relied upon, was an alleged failure to return—which in the context of this case is but the other side of the coin of physical departure—e.g., the mere absence standard.

There is, therefore, a conflict not only between the circuits on the proper construction of 18 U.S.C. § 3290; there is a conflict between the two panels of the Second Circuit which considered the case at bar. The statute in-

volved is one of wide application; and the resolution of the conflict in the interpretation of that statute may only be had by this Court granting certiorari to review the decision below.

III.

The application of the novel doctrine of "Constructive Flight" to the interpretation of 18 U.S.C. § 3290, without prior notice to Jhirad, violated his constitutional guarantee of due process.

Pursuant to its construction of 18 U.S.C. § 3290, the Court of Appeals in Jhirad I remanded the case to the District Court "to make findings on the issue of intent" of Jhirad in leaving India in order to determine whether or not the running of the limitations period—which otherwise had concededly expired—had been tolled.

The essential ingredient of due process in the trial of any issue is adequate notice of the issues to be tried—particularly where personal liberty is at stake. U.S. Constitution, 5th, Sixth and Fourteenth Amendments; *Cole* v. *Arkansas,* 333 U.S. 196 (1948); *Matter of Oliver,* 333 U.S. 257 (1948); *Smith* v. *O'Grady,* 312 U.S. 329 (1941); *Rabe* v. *Washington,* 405 U.S. 313 (1972); *Eaton* v. *Tulsa,* 415 U.S. 697 (1974).

Based upon the opinion in Jhirad I, Jhirad and his counsel went into the Magistrate's hearing on the remand in the belief that the issue on trial was "the intent of the appellant in leaving India". 486 F.2d, at pages 444-445. The District Court—*prior* to the hearing—thought so too. Appendix G, at page 66a, 377 F.Supp., at page 35.

As a result, both Jhirad and India offered evidence directed only to the issue of Jhirad's intent in departing from India in July of 1966. But the Magistrate determined the application of the tolling provision on a completely different fact issue—the timing and motivation of

Jhirad's determination months later not to return to India —an issue which the Magistrate articulated for the first time only after the hearing was over.

Jhirad was denied due process of law by the failure of the court to inform him in advance of the hearing what issues were to be tried. *Cf. Henderson* v. *Morgan,* U.S. Supreme Court, no off. rep., June 17, 1976, No. 74-1529.

The invention of the doctrine of "constructive flight" by the Magistrate only after the close of the hearing on remand was enormously prejudicial to Jhirad, for the Magistrate determined the issue based upon a single piece of testimony he himself elicited from Jhirad while the latter was on the witness stand. In response to the Magistrate's question respecting Jhirad's prior trips abroad, Jhirad responded from recollection—as it later turned out, incorrectly—that he had "normally" gone abroad for about a month at a time "because I couldn't take more than that time off when I was with Naval Headquarters". The Magistrate, although expressly finding that Jhirad left India in July 1966 to attend a World Jewish Conference and without intent to avoid prosecution, went on to conclude that Jhirad decided not to return to India "sometime in the middle of September" 1966 *solely* because Jhirad had by that time been away from India longer than his supposedly "normal" stay. This decision not to return, said the Magistrate, triggered the tolling provision.

This was a wholly irrational conclusion. First, the Magistrate simply ignored Jhirad's testimony that his prior stays abroad had been limited by the fact that he was then on active duty in the Navy while, when he left in July 1966, he was for the first time free of his active Naval duties and under no necessity to return at any given time. Second, Jhirad's recollection on the stand that he normally had stayed away in prior years for about a month was simply incorrect. As he demonstrated in his affidavit to the Second Circuit on his application for reargument, his

passports—one of which is in the custody of the District Court, another in the custody of India, and the third in his own possession—conclusively demonstrate that he had as often as not gone abroad in the past for two or three months at a time. But, ignorant of the issue actually being tried, Jhirad testified from mere recollection and had no opportunity to present the true facts.

In short, the Magistrate's failure to articulate the issue to be tried in advance of the hearing did not merely result in a *non sequitur* in the Magistrate's reasoning; it amounted to a trap. The result was critical to Jhirad's liberty, for the decision to find Jhirad guilty of "constructive flight" in mid-September 1966 permitted the Magistrate—and thereafter the District Court and the Court of Appeals—to hold that the running of the limitations period (on the last two charges upon which India seeks extradition) had beeen tolled just days before the five-year period would have expired on September 25 and September 27, 1966.

Indeed we suggest the very doctrine of "constructive flight" itself is irrational and a violation of Jhirad's constitutional right to due process of law. There is concededly no judicial precedent for the doctrine of "constructive flight". We suggest that the following considerations require a construction of the tolling provision limited to a determination of the accused's intent in leaving the jurisdiction at the time of his actual departure:

(a) This Court declared in *Toussie* v. *United States*, 397 U.S. 112, 114 (1970), that "criminal limitation statutes are 'to be liberally interpreted in favor of repose' [citations omitted]." If that clearcut statement of policy has any meaning at all, it must require that the tolling provision—which is already a sharp infringement on the policy of repose—be narrowly construed in favor of the accused.

(b) The lower courts were unable to enunciate a rational policy argument in support of the creation of this new legal fiction—"constructive flight". This pointless reaching out beyond the plain meaning of the statutory language is thus but one more step in the direction of making the law incomprehensible to the layman and unpredictable even to the lawyer.

(c) The words of the statute itself—"fleeing from justice"—as well as the ordinary dictionary definition of the verb "to flee", clearly refer to the time of departure from the jurisdiction as the only relevant point.

(d) Inherent in the lower courts' focus on Jhirad's decision not to return to India is the incorrect assumption that he was under some obligation to return or, at least that he had been requested to return and had refused. But just the opposite is true. He was under no obligation to return to India at all. Indeed, the record is clear that he left with the express permission of the Indian Navy, the Indian Finance Ministry and the Indian Passport Office—authority from each of whom was required and obtained before he traveled abroad. Far from "fleeing", Jhirad was at all times traveling openly on an Indian passport until 1967 when he emigrated to Israel—well after the five year limitations period had run. Appendix H, at pages 77a-78a.

IV.

The Extradition Treaty and the Constitutional Guarantee of Equal Protection under the Law required the application of the beyond a reasonable doubt standard—rather than mere preponderance of the evidence—to the trial of the limitations issue in the habeas corpus proceeding.

The District Court, in applying the statute of limitations (18 U.S.C. § 3282) and the tolling provision (18 U.S.C.

§ 3290) in accordance with Article 5 of the Extradition Treaty was required to make findings of fact to determine whether or not Jhirad was a "person fleeing from justice"—thus tolling the running of the limitations period. The Magistrate, however, refused to hold India to the same burden of proof on this issue as would be required of the prosecution in a domestic criminal case—thereby depriving Jhirad (a permanent resident alien) of the due process and equal protection of the laws guaranteed him by the United States Constitution.

In holding that Jhirad's decision not to return to India amounted to "fleeing" and that this decision was made in mid-September 1966—just a few days before the limitations period expired—the Magistrate expressly found that India had failed to prove the relevant facts beyond a reasonable doubt. The Magistrate then went on to hold that (1) the applicable standard was proof by a mere preponderance of the evidence and that (2) India had met this burden. Appendix H, at pages 78a-79a, 81a. The District Court and the Court of Appeals concurred.

In so doing, all of the lower courts agreed that the burden of proof could not be mere probable cause—that being the standard only on the hearing of "the evidence of criminality" under 18 U.S.C. § 3184. There, probable cause is arguably an appropriate standard, for the accused will presumably receive a plenary trial on those same issues when he returns to the country requesting extradition. The factual issues raised by the Treaty's application of the American statute of limitations, however, can never be raised in India but only in the courts of this country.

Conceding that the "probable cause" standard was inapplicable to the limitations issue, the lower courts nonetheless refused to hold India to the burden of proof which the prosecution in any domestic criminal case must meet—

that is, proof beyond a reasonable doubt. *People* v. *Kohut*, 30 N.Y. 2d 183 (1972); see also *United States* v. *Belimex Corp.*, 340 F. Supp. 466, 468-469 (S.D.N.Y. 1971); *Buhler* v. *United States*, 33 F. 2d 383 (9th Cir. 1929); *Donnell* v. *United States*, 229 F. 2d 560 (5th Cir. 1956); *Din* v. *United States*, 232 F. 2d 283 (9th Cir. 1956), *cert. den.* 352 U.S. 827; *Brouse* v. *United States*, 68 F. 2d 294 (1st Cir. 1933).

There is no judicial precedent on this issue in the context of an international extradition proceeding; but we suggest that the following constitutional and legal principles require that the evidentiary burden on India be proof beyond a reasonable doubt:

(a) Jhirad—a permanent resident alien since 1971 and a present applicant for United States citizenship—is, of course, entitled to due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution to the same extent as U.S. citizens. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

(b) Due process requires the application of the beyond a reasonable doubt standard because the issue being tried in this habeas proceeding—the application of the statute of limitations—directly determines whether or not Jhirad shall have, or shall lose, his liberty. See *In Re Winship*, 397 U.S. 358, 363 (1970); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1968).

(c) Under Article 5 of the Treaty and the constitutional guarantee of equal protection of the law, the domestic criminal statute of limitations, together with its concomitant burden of proof, must be applied to Jhirad in exactly the same manner as it is applied in domestic criminal proceedings, unless there is a rational basis for distinguishing between Jhirad *on this issue* and a domestic

criminal defendant. The very fact which the courts below conceded—that the issue of limitations can and will only be tried in this country—(unlike the "evidence of criminality")—requires the conclusion that there is no difference between Jhirad *on this issue* and domestic criminal defendants.

It is the Treaty itself which imports into the extradition proceedings a domestic criminal statute. It is the Treaty itself which gives the accused the opportunity to rely upon that domestic statute only once in this country, prior to the actual extradition. It is, therefore, the Treaty itself which places Jhirad in exactly the same posture *on this issue* as a domestic criminal defendant.

(d) The courts below, in essence, held that use of the beyond a reasonable doubt standard would be inconvenient for the Government of India, given the problems of time and distance involved. We suggest that due process and equal protection of the laws are principles which do not recognize inconvenience to the prosecution as relevant. Indeed, it is these very problems of time and distance—as measured from the point of view of the individual accused seeking to exercise his one opportunity to raise the limitations defense awarded him by the Treaty—which militate in favor of requiring the Government of India to sustain its burden by proof beyond a reasonable doubt.

(e) The unavoidable effect of the decision of the courts below is to sanction two different constructions of precisely the same criminal statute (18 U.S.C. § 3290) depending upon the status of the individual accused—an abhorrent result which this Court should overturn.

V.

There was no evidence in the record to sustain the Magistrate's finding that Jhirad decided not to return to India out of fear of prosecution.

The lower courts determined that the doctrine of "constructive flight" triggers the application of 18 U.S.C. § 3290 if the accused, having departed the jurisdiction innocently, (a) determines not to return, and does so, (b) out of a fear of prosecution. The Magistrate found that Jhirad had made this decision with this motivation in mid-September 1966, just days before the limitations period would otherwise have expired. There was absolutely no evidence in the record whatsoever of the occurrence of any event or circumstance after the departure of Jhirad from India in July 1966—which the Magistrate expressly found to have been innocent—upon which to base the conclusion not only that Jhirad decided in mid-September not to return, but that he did so out of fear of prosecution. Even assuming, *arguendo*, that the Magistrate could properly infer from the length of Jhirad's stay abroad by mid-September that he had decided not to return—an inference that in truth is but the merest speculation—there was no evidence whatever upon which to base even an inference respecting the motivation for that decision. Since the burden of proof—by whatever standard—was concededly upon the Government of India, the lack of any evidence on this issue requires the conclusion that the tolling provision was not triggered and that the limitations period expired.

VI.

The Magistrate was incorrect as a matter of law in finding probable cause to hold petitioner for extradition.

At the § 3184 hearing, the Government of India was required to make out a *prima facie* case sufficient "to block

out those elements essential to conviction." *Collins* v. *Loisel*, 259 U.S. 309, 317 (1922). The Indian charge sheets, or indictments, charged Jhirad with the equivalent of embezzlement, alleging that a portion of the Naval Prize Fund was missing, that Naval personnel entitled to share in the Fund had not received their portion and that there were withdrawals from the Fund that matched deposits in Jhirad's account. The Magistrate held that India had failed to prove either that any money was missing or that an eligible claimant had not received his share; but he nonetheless found probable cause to hold Jhirad for extradition. That conclusion was incorrect as a matter of law. 29A *Corpus Juris Secundum*, Embezzlement §§ 11(b), 11 (e); 26 Am. Jur. 2d, Embezzlement, § 39; *People* v. *Reynolds*, 214 App. Div. 21, 34-35 (2d Dept. 1925); *People* v. *Cohen*, 352 Ill. 380, 182 N.E. 608 (1933).

Both India and the Magistrate ultimately relied solely on evidence of deposits into Jhirad's bank account which, standing alone, have no evidentiary value whatsoever in an embezzlement case. *Tinsley* v. *Bauer*, 271 P. 2d 110 (Calif. 1954); *Parnell* v. *State*, 339 So. West 2d 49 (Texas Court of Criminal Appeal 1959); *People* v. *Von Cseh*, 9 A.D. 2d 660 (N.Y. App. Div., First Dept. 1959).

In order to try to show a correspondence between the deposits into Jhirad's account and prior withdrawals from the Fund, both India and the Magistrate were forced to rely solely upon evidence respecting the time-barred charges. No such correspondence between withdrawals and deposits exists at all with respect to the two charges upon which the extradition is based. Reliance by the Magistrate solely upon evidence respecting the time-barred charges violated Jhirad's right to due process.

VII.

The uncontradicted evidence established that Jhirad was being sought by the Government of India to punish him for pro-Israel political activity, in violation of Article Six of the Extradition Treaty.

The District Court correctly concluded that Article 6 of the Treaty bars extradition for political offenses and that:

> "A fair reading of the Treaty compels the conclusion that this Treaty creates a prohibition against politically motivated extradition, and therefore the Magistrate properly allowed evidence to be presented on this issue."

The Magistrate found that Jhirad was an "outspoken apostle of the cause of the new nation of Israel" which was "unpopular" since India "is aligned with the Arab bloc of nations."

Nonetheless, the Magistrate found no political motivation in India's actions against Jhirad, even though the uncontradicted evidence showed that Jhirad was under surveillance by the Indian Special Police Establishment because of his public pro-Israel activity, that his telephone was tapped, his mail was opened, and that he had been chastized by the Defense Minister, Krishna Menon, for having negotiated a pro-Israeli International Convention on the law of the sea.

These elements, coupled with (a) the extraordinarily flimsy case brought against Jhirad, (b) the length of time it has taken India to put it together, (c) the amount of money it has obviously expended, and (d) its continued pursuit of Jhirad even after 50 of the 52 charges against him have been time-barred, indicate that India's requisi-

tion for Jhirad's surrender has, in fact, been made with a view to punish him for an offense of political character.

The Government of India produced not a single shred of evidence to contradict this evidence; nor did it in any way attempt to challenge the necessary inferences which must be drawn therefrom, despite the fact that India has known since Jhirad's bail hearing four years ago that such a defense would be raised.

The utterly sham character of the charges against Jhirad is highlighted by the fact that India has apparently not sought to bring either Admiral Katari or P. L. Sharma to trial, despite the fact that they were co-administrators of the Naval Prize Fund in question together with Jhirad. Either one or the other was required to co-sign each of the withdrawal slips or checks which India relies upon as proof of Jhirad's alleged misappropriation. Yet Sharma remains undisturbed at his post in the Indian Naval Law Directorate to this day, while the Admiral appears to be in quiet retirement, undisturbed by the S.P.E.

The charge is embezzlement from a Naval Prize Fund; yet the case was begun not by the Navy but by the Special Police Establishment; the case was presented to the magistrate in India not by the Navy or the Attorney-General but by the Special Police Establishment; the chief witness before the Magistrate in the United States District Court was not from the Navy but from the Special Police Establishment; and it is clearly the Special Police Establishment and not the Indian Navy that wishes to return Jhirad to India.

Moreover, the sheer implausibility of India's case simply boggles the imagination. What India alleges, on the original 52 counts in its charge sheets, is that Jhirad embezzled well over 40 percent of the Fund. And yet—in a country of such grinding poverty that 100 rupees may be a year's income—there is *no* evidence of any complaint being

made by any claimant until nine years after the Proclamation of the Fund was issued, when a sailor wrote to the Navy that he would like a share even though he never filed a claim. The Government of India has been unable to locate a single eligible sailor who did not receive his share of the Fund.

This Court can hardly close its eyes to the fact that, on October 10, 1975, India voted in the United Nations in favor of the resolution equating Zionism with racism—a blatantly anti-Semitic resolution designed, in part, to question Israel's right to existence. Nor should this Court overlook the overwhelming evidence that India, in this past year and a half, has virtually become a dictatorship, with the bulk of its traditional political opposition leadership behind prison walls. Nor should this Court overlook the statement by the Indian Attorney-General to the Indian Supreme Court (as reported in a despatch to the *New York Times*, April 27, 1976):

"There is no personal rights law for the time being."

Under these circumstances, Jhirad, a citizen of Israel to this day (though since 1971 a permanent resident alien of the United States), will have little chance of obtaining a fair trial in India. Indeed, the very fact that the Special Police Establishment is still seeking Jhirad's return for trial on charges limited by the Treaty to $1,600 is perhaps the most practical demonstration that it is not a claimed embezzlement which stands behind India's request for extradition. This Court has no reason to assume that the Government of India, in pursuing Jhirad half way around the world for a decade, has been acting frivolously. Since the two charges for which Jhirad may now be extradited are plainly frivolous—and yet India's pursuit continues—there can no longer be any doubt that political retribution is the real reason behind India's request.

On that ground, the Treaty itself bars extradition; and the writ should issue.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the Court of Appeals for the Second Circuit.

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Respectfully submitted,

EDWARD L. SADOWSKY
Attorney for Petitioner, Jhirad
100 Park Avenue
New York, New York 10017
(212) 953-1800

Of Counsel:

TENZER, GREENBLATT FALLON & KAPLAN
HERBERT TENZER
LEO GUZIK
STACY L. WALLACH
MONA D. SHAPIRO